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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN J.C. STEPHENS, Defendant and Appellant.	G034395 (Super. Ct. No. 03NF2129) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Erick L. Larsh, Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil P. Gonzalez and Garrett Beaumont, Deputy Attorneys General, for Plaintiff and Respondent.

Following a contested hearing, the trial court found appellant violated his probation by committing battery and driving without a valid license. The court then revoked probation and sentenced appellant to 25 years to life in prison. On appeal, appellant alleges evidentiary and sentencing error. He also contends there is insufficient evidence to support the court's finding he drove without a valid license. Finding no basis to disturb the judgment, we affirm.

* * *

On July 30, 2003, appellant pled guilty to possessing and being under the influence of methamphetamine. He also admitted having suffered four prior strike convictions and served a prior prison term. The court suspended imposition of sentence and granted probation on the condition appellant enrolled in a "Prop. 36 drug diversion program." Appellant was also ordered to obey all laws.

Two days later, on the afternoon of August 1, appellant was driving with his girlfriend Kelly Balint when he pulled into an alley behind Yuri Romashouk's workplace. Romashouk noticed appellant because he was driving fast and nearly clipped a wall as he parked. Romashouk couldn't see everything that was going on in the car, but it appeared to him that its occupants were fighting. Appellant had an angry look on his face and was pushing down on Balint, who was in the backseat and holding up her arms as if she was surrendering. Romashouk did not think appellant was putting a Band-Aid on her. Rather, he suspected foul play and called the police.

Officer Mark McMullin arrived shortly and spoke to Balint. She had a cut on her forehead and a bruise on her upper right arm, but she was not agitated or upset. She said she and appellant had gotten into an argument earlier that day at a friend's house. During the incident, appellant became upset and grabbed her shoulder. As she pulled away, their heads accidentally collided, causing her forehead cut. After that, they drove to the store to get some first aid supplies. Then they started to drive and argue

again. Eventually, they pulled into an alleyway and the police showed up. Balint denied appellant ever hit or choked her.

A search of the car turned up a full bottle of hydrogen peroxide and an unopened box of bandages. A few drops of blood were found in the vehicle, as well. Officers also noticed a large crack in the front windshield that appeared to have been caused "from the inside out."

Officer Christopher Masilon handcuffed appellant and placed him in the back of his squad car. He told appellant he was not under arrest, but was only being detained until police could find out what happened. Appellant said that when he picked up Balint earlier that day, she wanted to get some drugs, but he refused. She then "freaked out" and started flailing her arms. He pulled over, they argued, and then he noticed a cut on her forehead. He denied laying a hand on her or knowing how she got cut.

Masilon arrested appellant and took him into custody. Later that evening, around 10:30, he interviewed appellant for a second time. After waiving his *Miranda* rights, appellant gave essentially the same story as before. He also said he had tried to put a Band-Aid on Balint's cut while they were in the car.

About a month later, on August 28, appellant received a traffic ticket in Fullerton. During the stop, appellant did not have a valid California driver's license, but he did produce an Arizona driver's license. He said he lived in Arizona and was visiting his father in Fullerton. DMV records listed addresses for appellant in both Arizona and California.

Appellant was charged with violating probation by committing battery and driving without a valid driver's license. The court found appellant battered Balint when he grabbed her shoulder during their initial argument. The court also found appellant drove without a valid driver's license. Thereupon, the court revoked appellant's probation and sentenced him to 25 years to life under the Three Strikes law.

I

Relying on *Missouri v. Seibert* (2004) 542 U.S. 600, appellant contends the trial court erred in admitting his pretrial statements into evidence. But the facts of *Seibert* bear little resemblance to the facts at hand. In that case, the police intentionally manipulated their interrogation of the defendant so as to undermine the United States Supreme Court's landmark decision in *Miranda v. Arizona* (1966) 384 U.S. 436, which, by requiring the police to inform suspects of their right to remain silent and an attorney, was designed to safeguard the privilege against self-incrimination. Per departmental policy, the police in *Seibert* deliberately refrained from giving the defendant her *Miranda* rights at the start of her interrogation. Then, after she confessed, they obtained a *Miranda* waiver, covered the same ground a second time, and got her to repeat her confession. Knowing her initial confession violated *Miranda*, the police hoped her second one would pass constitutional muster.

They were wrong. Speaking for a plurality of the court, Justice Souter ruled the "question-first" strategy employed by the police in *Seibert* was troubling because "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' [Citation.]" (*Missouri v. Seibert, supra,* 542 U.S. at pp. 613-614.) Rejecting the notion a defendant's waiver removed the taint of the earlier *Miranda* violation, the plurality decided "midstream recitation of warnings after an interrogation and unwarned confession could not effectively comply with *Miranda*'s constitutional requirement . . . ." (*Id*. at p. 604.)

Unlike *Seibert*, the police in this case did not attempt to do an end-run around the dictates of *Miranda*. Although appellant's initial on-the-scene questioning took place in violation of *Miranda*, there is no evidence this was designed to lure appellant into making — much less later repeating — a confession. In fact, appellant did

not confess at any point during his questioning. And in contrast to the situation in *Seibert*, appellant's *Miranda* warnings did not come "midstream" during a "coordinated and continuing interrogation." (*Missouri v. Seibert, supra,* 542 U.S. at pp. 604, 613-614.) Rather, they came during his second round of questioning, which took place seven hours after his initial interview and after he was transported to the police station.

Under these circumstances, it is unlikely appellant was confused about his *Miranda* rights. Given the separation of time and place between the two interrogations, as well as the utter lack of evidence indicating the police were out to undermine *Miranda*, we are convinced appellant's postwarning statements were properly admitted into evidence. (See *Oregon v. Elstad* (1985) 470 U.S. 298, 314 [upholding admission of defendant's Mirandized stationhouse statements even though defendant made early un-Mirandized statements at his home].) No error has been shown.

II

Appellant also challenges Balint's statements, claiming they were inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36. He is wrong on this point, too.

Crawford requires both unavailability and a prior opportunity for cross-examination before a witness's extrajudicial testimonial statements may be admitted into evidence. (*Crawford v. Washington, supra,* 541 U.S. at p. 68.) However, as explained in *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, "*Crawford*'s holding is based squarely on the Sixth Amendment right to confront witnesses. [Citation.] Probation revocation proceedings are not 'criminal prosecutions' to which the Sixth Amendment applies. [Citations.] Probationers' limited right to confront witnesses at revocation hearings stems from the due process clause of the Fourteenth Amendment, not from the Sixth Amendment. [Citation.] Thus, *Crawford*'s interpretation of the Sixth Amendment does not govern probation revocation proceedings. [Citation.]" Balint's statements were therefore admissible.

III

Next, appellant asserts there is insufficient evidence to support the court's finding he drove without a valid license. We disagree.

Unlike a criminal conviction, which requires proof beyond a reasonable doubt, a probation violation need only be proven by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 440-441.) When a defendant challenges the sufficiency of the evidence supporting a court's finding he violated probation, our review "is based on the substantial evidence test. Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted.)

"A person may not drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under [the Vehicle Code], except those persons who are expressly exempted under [that] code." (Veh. Code, § 12500, subd. (a).) Among the persons exempted are nonresidents over the age of 18 who possess "a valid driver's license issued by a foreign jurisdiction of which he or she is a resident . . . ." (Veh. Code, § 12502, subd. (a)(1).)

Appellant admits he has not had a valid California driver's license since 1991. However, he argues that is immaterial because "[t]he events, acts, or occurrences evident in the record do not establish [his] presence in [] California was anything more than temporary or transient." But the prosecution produced evidence that the DMV has addresses listed for appellant in both Arizona and California. And it is undisputed appellant was in California on both August 1 and August 28, 2003, the days on which the

probation violations were alleged to have occurred. He was also in California on July 1, 2003, the day his underlying drug offenses took place.

On this record, the trial judge was entitled to disbelieve appellant's statement to the police that he lived in Arizona and was merely visiting his father in California. Substantial evidence support's the trial court's determination appellant violated the Vehicle Code by driving without a valid California driver's license.

IV

Appellant argues a sentence under the Three Strikes law was unauthorized because when the court granted him Proposition 36 probation, it impliedly dismissed his prior strike convictions in furtherance of justice under Penal Code section 1385. The argument is premised on the fact the Three Strikes law prohibits a court from granting probation to a defendant who has prior strike convictions. (Pen. Code, § 667, subd. (c)(2).) Since the court granted appellant probation, he argues that by operation of law, the court should be deemed to have dismissed his prior strikes, even though he did not ask the court to exercise its Penal Code section 1385 authority, and the court did not expressly do so. While clever, the argument does not hold up under close scrutiny.

Under Penal Code section 1385, subdivision (a), the trial court is empowered to dismiss a prior strike conviction in the furtherance of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 507-508.) However, the court's authority in this regard "is limited. Its exercise must proceed in strict compliance with [Penal Code] section 1385[, subdivision] (a) . . . ." (*Id*. at p. 530.) Under that section, "The reasons for the dismissal must be set forth in an order entered upon the minutes." (Pen. Code, § 1385, subd. (a).) In other words, an implied dismissal is a legal oxymoron. The court must state and record its reasoning if it decides to invoke its power under Penal Code section 1385. We cannot infer a section 1385 dismissal from a silent record.

More fundamentally, in light of Proposition 36, we do not read the Three Strikes law as an absolute bar on probation absent a decision by the trial court to dismiss

a defendant's prior strike convictions. Proposition 36 clearly carves out an exception for strike offenders who have been convicted of a nonviolent drug possession offense and have avoided prison and criminality for the five years preceding that offense. (See Pen. Code, § 1210.1, subd. (b)(1).) That being the case, the trial court was authorized to grant appellant probation without dismissing his prior strike convictions. A fortiori, the court was also at liberty to consider those convictions in sentencing appellant upon revoking his probation.

V

Nevertheless, appellant contends the trial court should have dismissed his prior strike convictions in the interest of justice. As explained above, the trial court had this authority under Penal Code section 1385. However, we do not believe the court abused its discretion in refusing to exercise it, given appellant's background and prospects.

In deciding whether the interests of justice support the dismissal of a prior strike conviction, the court must consider the constitutional rights of the defendant and the societal interest in ensuring the fair prosecution of crimes properly alleged. (*People* v. *Superior Court (Romero), supra,* 13 Cal.4th at p. 530.) Ultimately, the court must decide "whether, in light of the nature and circumstances of his present felonies and prior [strikes], and the particulars of his background, character, and prospects, the defendant may be deemed outside the [spirit of the Three Strikes law], in whole or in part, and hence should be treated as though he had not previously been convicted of one or more [strikes]." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

Appellant has a long history of drug use and violent behavior. In 1990, at the age of 19, he was convicted of battery for pushing a coworker down the stairs during an argument. Two years later, he brandished a gun during an incident stemming from a botched drug deal. He was given probation, but it did little to curb his criminal appetite. Within a year, he was convicted of carrying a loaded firearm and multiple counts of

receiving stolen property. In 1993, he was convicted of assault with, and negligent discharge of, a firearm, his first two strike offenses. He was then sentenced to seven years in prison for participating in a home invasion robbery during which he shot the victim in the chest. His conviction for burglary and assault with a deadly weapon in that case were his third and fourth strikes.

Sadly, appellant's actions in the present case indicate he is still involved with drugs and violence. They point out the obvious fact that neither probation, parole nor prison has worked to deter him from engaging in unlawful conduct. His criminal record is so daunting, the trial judge feared "that if [he] is back out on the street and goes back to his drug habit, [he] will kill somebody . . . ." Given appellant's lengthy and serious record of criminal behavior — and the fact Proposition 36 gave him one free bite of the apple which seemed to make no impression, whatsoever — we do not believe the court abused its discretion in refusing to dismiss his prior strike convictions.

VI

We also reject appellant's claim his sentence of 25 years to life constitutes cruel and unusual punishment. In recent years, the United States Supreme Court has rejected similar claims arising from application of California's Three Strikes law. (See *Ewing v. California* (2003) 538 U.S. 11 [upholding 25-years-to-life sentence for grand theft with priors]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [upholding 50-years-to-life sentence for petty thefts with priors].) The high court has made clear that absent gross disproportionality in the defendant's sentence, no Eighth Amendment violation will be found. (*Ewing v. California*, *supra*, 538 U.S. at pp. 20-21; *Lockyer v. Andrade*, *supra*, 538 U.S. at pp. 72-73.) Similarly, a sentence will not be found unconstitutional under the state Constitution unless it is so disproportionate to the defendant's crime and circumstances that it shocks the conscience or offends traditional notions of human dignity. (See *People v. Dillon* (1983) 34 Cal.3d 441; *In re Lynch* (1972) 8 Cal.3d 410, 424.)

In assessing proportionality, we must keep in mind, "The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he [or she] has demonstrated over a period of time during which he [or she] has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285.)

As recounted above, appellant's criminal record is both extensive and serious. While his most recent transgressions are relatively minor, he has clearly displayed the necessary propensities to warrant an extended commitment. As such, we do not believe his sentence is unconstitutionally disproportionate under state or federal law.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.